That there was in the principal case a publication of defamatory words is not doubted, but it is by no means clear that there was a libel at all as distinguished from a slander. Lord Esher defines the publication of a libel as "The making known the defamatory matter after it has been written. . . ." It involves the idea of a manuscript written by the defendant or in his hands, and through his fault communicated to a person other than the one defamed. Odgers, Libel and Slander, 3d ed., 170, 171. In the principal case, however, these requirements are not fulfilled. When the words were uttered, no writing was in existence. That was only created subsequently, and then not by the defendant, but by the very person to whom it is contended the libel was published. That there cannot be a publication of a writing that has no existence is obvious. It follows that there was a publication by the defendant of words merely, and that the action should have been for slander and not for libel. Odgers, Libel and Slander, 3d ed., 174.

The distinction suggested is technical but it leads to important practical results. A libel is actionable without proof of special damage, but a slander is not unless the words are actionable *per se*. Accordingly, if the proper action is for libel the employer must be held in every case, whereas if for slander, he would rarely if ever be liable, unless the words were actionable *per se*, since he is not as a rule liable for repetitions. *Shurtleff* v. *Parker*, 130 Mass. 293. Sound public policy demands the latter result. If the law allows a communication to be made it seems sensible that it should be made according to the usual method of transacting business, and the welfare of the business community requires that acts so done shall not become the basis of litigation. On the other hand, it is urged that business necessity must not be made an excuse for licensed defamation. The observance of the distinction between libel and slander here suggested will result in a satisfactory compromise between these extremes. The liability of employers is limited to cases in which ordinary good taste and often common decency would forbid indirect communication, while the general public suffers no undue hardship, since in aggravated cases the action for slander still remains.

RECENT CASES.

ADMINISTRATIVE LAW — CONTRACTS — BOND OF INDEMNITY FOR NOT LEVYING EXECUTION. — A sheriff was in honest doubt as to whether a *fieri facias*, valid on its face, was issued within the time allowed by law. The defendants gave the sheriff a bond of indemnity with condition to save him harmless in not making the levy. *Held*, that the bond was valid. *Ray* v. *McDevitt*, 85 N. W. Rep. 1086 (Mich.).

The current of authority supports the view that an instrument is void if given to indemnify an officer of the court against loss resulting from failure to execute process, which is on its face such as the court could legally have issued. *Denson* v. *Sledge*, 2 Dev. Law (N. C.) 136; *contra*, *Randle* v. *Harris*, 6 Yerg. (Tenn.) 508. In such cases, good faith of the officer has generally been held immaterial. *Harrington* v. *Crawford*, 136 Mo. 467; *contra*, *Joyce* v. *Williams*, 1 Tayl. (N. C.) 27. To enable courts to enforce their judgments, the law protects an officer in executing a writ good on its face. FREEMAN, EXECUTIONS, 3d ed., § 101. When an officer is thus protected, a contract to save him harmless in not obeying the writ encourages disobedience of the order of the court, and therefore is clearly against the policy of the law. A contract to indemnify the officer against the consequences of executing a similar

writ stands on a different footing, and may be valid if made with *bona fide* intention of securing a legal right. *Placket* v. *Gresham*, 3 Salk. 75.

ADMIRALTY — SALVAGE — LIABILITY OF PERSONS BENEFITED. — Government stores were shipped on a chartered vessel, subject to stipulations under which the charterers were responsible for their safe delivery. The vessel came into collision and required salvage assistance. The salvors, after refusal of compensation by the government, brought an action *in personam* against the charterers. *Held*, that the action lies. *The Cargo ex Port Victor*, [1901] P. D. 243.

The decision represents the tendency to follow equitable rather than common-law principles in the administration of maritime law. *The Juliana*, 2 Dods. 504, 520, 521. The salvors, having neglected to pursue their action *in rem* against the stores, and being unable to proceed *in personam* against the government, would lose their reward unless enabled to reach the defendants; and the latter, although not holding the legal title, have enjoyed the benefit of the salvage services by reason of their responsibility for the safety of the property salved. The decision, in holding that liability to the salvors' claim is not confined to the legal owners, but extends to persons interested in the preservation of the property, follows the case of *The Five Steel Barges*, 15 P. D. 142. Difficulty, however, may be found in defining interests liable for salvage services. A Scottish decision has allowed salvage against a common carrier. *Duncan* v. *The Dundee, etc., Co.*, 15 Scot. L. R. 429. Insurers and bottomry bondholders would seem to be equally liable, while the cases of mortgagees and lienholders may properly be distinguished. No decisions except those cited have been found.

AGENCY — RATIFICATION — UNDISCLOSED PRINCIPAL. — One Roberts, intending to act in behalf of the defendants, but without their authority and without professing to act as an agent, entered into a contract with the plaintiff. *Held*, that the defendants could not ratify Roberts's act, so as to become privy to the contract. *Keighley, Maxsted & Co.* v. *Durant*, [1901] A. C. 240. See NOTES, p. 221.

BANKRUPTCY — PREFERENCES — SURRENDER A CONDITION OF PROVING CLAIM. — In the usual course of business, creditors received payments from an insolvent debtor, against whom a petition in bankruptcy was filed within the four months succeeding. *Held*, that under the act of 1898 these payments must be surrendered before proof for the remainder of the creditors' claim can be allowed. *Pirie* v. *Chicago Title & Trust Co.*, 21 Sup. Ct. Rep. 906.

This case, in which the Supreme Court follows a majority of the previous decisions of the lower courts, is noteworthy as marking a departure in bankruptcy law. *In re Ratcliff*, 107 Fed. Rep. 80; BRANDENBURG, BANKR., 2d ed., 520. The law of preferences began with Lord Mansfield's decisions holding certain payments voidable by a bankrupt's assignees as fraudulent and illegal. The novel doctrine was strictly limited by English courts and slowly extended by Parliament. LOWELL, BANKR., ch. v. Preferences received by a creditor having no reasonable cause to believe a preference was intended have probably never been illegal in England, and the surrender of legal preferences never a condition of proving remaining claims. See *In re Hall*, 2 N. B. N. Rep. 1126. Until the present act the law in the United States relating to preferences was in this respect substantially like contemporaneous English law. The statute of 1898 provides (§ 57 *g*) that "The claims of creditors . . . shall not be allowed unless . . . [they] surrender their preferences." This unambiguous clause seems to cover preferences received as payments in the usual course of business. Although the result is unsatisfactory in practice the defect in the act is properly one for the legislature to remedy.

BANKRUPTCY — PROPERTY PASSING TO ASSIGNEES — CHOSES IN ACTION. — In an action for trespass to land and conversion of goods the principal damages claimed were for personal annoyance. On motion made before the jury was sworn, the trial judge ordered the action stayed, because the plaintiff had been adjudged a bankrupt after the suit was begun. *Held*, that the ruling was incorrect, on the ground that such an action does not pass to the plaintiff's assignees in bankruptcy. *Rose* v. *Bucket*, 17 T. L. R. 544 (C. A.). See NOTES, p. 229.

BANKRUPTCY — PROVABLE CLAIMS — CONTINGENT LIABILITIES. — *Held*, that the present value of an annuity, calculated by life-tables, is a claim provable in bankruptcy. *Cobb* v. *Overman*, 109 Fed. Rep. 65 (C. C. A., Fourth Circ.).

A petition in bankruptcy against an indorser of a promissory note was filed before the note matured. *Held*, that the holder's claim against the indorser is provable in bankruptcy. *Moch* v. *Market St. Nat. Bank*, 107 Fed. Rep. 897 (C. C. A., Third Circ.).

Although modern bankruptcy legislation aims to discharge all liabilities save those excepted because of public policy, express provisions for proving all contingent claims capable of present valuation are omitted, perhaps inadvertently, from the act of 1898. The act therein differs from the acts of 1841 and of 1867, and from modern English statutes. See 14 HARV. LAW REV. 372. However, § 63 *a* (4) of the act of 1898, providing that "debts . . . may be proved . . . which are . . . founded upon an open account or upon a contract express or implied," if liberally interpreted would probably include most contingent liabilities. Unfortunately, clauses relating to provable claims have usually been construed very narrowly, frequent protests of judges and text-writers notwithstanding. *Ex parte Groome*, 1 Atk. 114; LOWELL, BANKR. §§ 164 *et seq.* But in the principal cases the federal courts are not bound directly by authority, as exactly the same question could not arise under the act of 1841 or of 1867, and apparently did not under the act of 1800. *Cf. Marks* v. *Barker*, 1 Wash. C. C. 178. Accordingly, although the cases depart from the former spirit of construing similar clauses, neither the result nor the process of reaching it is much to be regretted.

CONFLICT OF LAWS — BILLS AND NOTES — CAPACITY. — A married woman, domiciled in New Jersey and there incapable of contracting, made in that state a note payable to her husband for his accommodation, and he negotiated the note in New York, where the wife was under no incapacity. *Held*, that New York is the place of contract and its law applies. *Thompson* v. *Taylor*, 49 Atl. Rep. 544 (N. J., C. A.).

Though the state of the English law is rather doubtful, in America it is well settled that the *lex loci contractus* controls capacity to contract. *Bowles* v. *Fields*, 78 Fed. Rep. 742; see 10 HARV. LAW REV. 168. There is some authority for applying the *lex domicilii* where the person whose capacity is in question, being in his own state, has procured the contract in another state by agent. *Freeman's Appeal*, 68 Conn. 533. According to the better opinion, however, these cases should form no exception to the general rule. *Milliken* v. *Pratt*, 125 Mass. 374. The result in the principal case may be reached in two ways. There is authority for holding that accommodation paper has no validity till negotiation. *Whitten* v. *Hayden*, 7 Allen, 407. The other view finds an obligation, but a defence of a strictly personal character in favor of the maker. *Moore* v. *Baird*, 30 Pa. St. 138, *semble*. If the note has no validity till negotiation, the principal case is clearly right. Under the second view, the note, by reason of the incapacity, is worthless till carried out of New Jersey, but the maker, having authorized a negotiation of it in New York, has in effect adopted it there by agent as her note and cannot rely on her New Jersey incapacity against a New York holder.

CONTRACTS — CONSTRUCTION — "ENGAGE AND EMPLOY." — By a contract in writing the defendant "agrees to engage and employ" the plaintiff for a fixed term as a representative salesman and "further agrees to remunerate him." The plaintiff was dismissed from service but the stipulated salary was offered him. *Held*, that no action lies for breach of the contract. *Turner* v. *Sawdon*, 49 W. Rep. 712 (Eng., C. A.).

No authority has been found exactly in point. "Employ" may mean either to provide actual work, or to retain in service without being bound to provide work, as when a family physician is employed at an annual salary. See *Emmens* v. *Elderton*, 4 H. L. Cas. 624. In either case the court's decision that the contract is fulfilled by mere payment would seem unsound. Ordinarily if wages are paid the employee would suffer no damages by dismissal, but this would not always be true. Thus, to employ an actor imports the obligation to give him opportunity to appear before the public. *Fechter* v. *Montgomery*, 33 Beav. 22, 26; *Bunning* v. *Lyric Theatre*, 71 L. J. Rep. 396. Similarly there might be cases where the loss of business connection with the employer would be a substantial injury. It would seem therefore that in the absence of evidence to the contrary the parties should be presumed to have used "employ" in accordance with the probable business understanding of the word, and that in severing all connection between himself and the plaintiff, the employer broke his contract.

CORPORATIONS — ULTRA VIRES — UNAUTHORIZED USE OF REAL ESTATE. — A corporation, empowered to erect and operate safety-deposit vaults and authorized to possess real estate necessary for the transaction of its business, built a fourteen-story

office-building which contained but one safety-deposit vault. *Held*, that the lessee of a room in the building could not plead *ultra vires* in an action to recover rent, since that plea can be interposed in a collateral proceeding only when the corporation is alleged to have performed an act which it was not under any circumstances authorized to perform. *Rector* v. *Hartford Deposit Co.*, 60 N. E. Rep. 528 (Ill.).

The mere fact that a corporation has acquired more real estate than its charter authorizes does not annul its title. *Fayette Land Co.* v. *Louisville, etc., R. R. Co.*, 93 Va. 274, 285 *et seq.*; *Mallett* v. *Simpson*, 94 N. C. 37. If its holdings, however, are clearly in excess of what is authorized by its charter, the state may interfere. *People* v. *Pullman's, etc., Co.*, 175 Ill. 125, 142. The usurpation of unauthorized functions in the principal case would seem to be sufficient to justify such action by the state, and almost enough to fulfil the requirements laid down by the court for a collateral attack. The tendency of recent decisions, however, has been to limit the scope of the plea of *ultra vires* and to refuse on equitable grounds to allow it when one party has received the entire benefit of the contract and seeks to avoid assuming the burden. *Bath Gaslight Co.* v. *Claffy*, 151 N. Y. 24, 36. The result reached in the principal case seems clearly right, though this latter ground is perhaps a more satisfactory basis of decision than that given by the court.

CRIMINAL LAW — HUSBAND AND WIFE — PRESUMPTION OF MARITAL COERCION. — A wife was indicted for carrying a weapon into a jail with intent to facilitate the escape of her husband. *Held*, that the offence was committed in the husband's presence and that the presumption of coercion thus arising is not rebutted by the circumstance of the husband's imprisonment. *State* v. *Miller*, 62 S. W. Rep. 692 (Mo.).

With the modern development of the rights of married women all satisfactory reason for the presumption of marital coercion has disappeared, and courts have shown a commendable tendency to limit the rule, until little of it remains. STEPHEN, DIG. CRIM. LAW, 5th ed., 399; *United States* v. *De Quilfeldt*, 2 Cr. L. Mag. 211. So far from following this tendency, the principal case seems to be an unwarrantable extension of the doctrine. The intention was formed, the execution of the crime begun and all but completed outside the jail, and the fact that the defendant came into her husband's actual presence simultaneously with the completion of the crime can hardly justify the presumption in question. *Quinlan* v. *People*, 6 Parker, C. C. 1. If, on the other hand, the presumption is raised out of a constructive presence, it was for the jury to determine whether she was so far within the range of his control as to afford ground for presuming coercion. *Commonwealth* v. *Daley*, 148 Mass. 11. Even if coercion could be presumed, slight circumstances will rebut it, and the jury should have been allowed to decide whether the husband's helpless situation was sufficient to do so. *Cf. Reg.* v. *Pollard*, 8 C. & P. 553.

CRIMINAL LAW — LARCENY — INNOCENT AGENT. — The defendant pointed out and, without taking possession, purported to sell to an innocent purchaser, a horse which he did not own. Later the purchaser took possession of the horse in an adjoining county. *Held*, that the defendant was guilty of larceny in the latter county. *Walls* v. *State*, 63 S. W. Rep. 328 (Tex. Cr. App.).

Cases exactly parallel seem to be almost entirely confined to the state of Texas. On similar facts the same court formerly reached an opposite conclusion, holding that there was no larceny because possession of the property was not taken by the accused. *Lott* v. *State*, 20 Tex. Cr. App. 230. This case, however, was immediately overruled, and the doctrine of innocent agent rightly applied. *Doss* v. *State*, 21 Tex. Cr. App. 505. The fraudulent sale of another's property does not of itself make the seller guilty of larceny. *Hardeman* v. *State*, 12 Tex. Cr. App. 207. But as soon as actual possession is taken by the innocent purchaser the crime is complete. The taking by the purchaser is coupled with the *animus furandi* of the seller, for the law, to avoid the anomaly of a crime without a criminal, makes the act of the innocent agent the act of the principal. 1 BISH. CRIM. LAW, 7th ed., § 651; *People* v. *Adams*, 3 Denio 190. Although the instances in which this doctrine has been applied to larceny are few, its applicability has long been recognized. 2 EAST, P. C. 555.

DIVORCE — FOREIGN DECREE — DOMICIL — JURISDICTION. — In a suit for divorce the respondent set up a previous divorce obtained by himself in another state. The court found from the evidence that he had not acquired such *bona fide* residence in the other state as to give its courts jurisdiction under the laws of that state. *Held*, that the foreign decree is not entitled to faith and credit. *Bell* v. *Bell*, 21 Sup. Ct. Rep. 551. See NOTES, p. 66.

EQUITY — INJUNCTION — PERSUADING ANOTHER TO BREAK HIS CONTRACT. — The plaintiff's apprentices were under contract not to connect themselves with trade unions. The defendant had persuaded some of them and was persuading others to join his union. *Held*, that the defendant was properly enjoined from further endeavoring to persuade the apprentices to join a union. *Flaccus* v. *Smith*, 48 Atl. Rep. 894 (Pa.).

The doctrine that a tort liability exists for persuading a third person to break a contract with the plaintiff, is probably established in England. *Lumley* v. *Gye*, 2 E. & B. 216. It has generally but not universally been accepted in this country. *Bixby* v. *Dunlap*, 56 N. H. 456; *contra*, *Boyson* v. *Thorn*, 98 Cal. 578. The principal decision is interesting as apparently the first application of the remedy of injunction to this kind of case, and will probably be followed in those jurisdictions where the doctrine of *Lumley* v. *Gye*, *supra*, prevails. The inadequacy of the legal remedy is the test that determines the right to an injunction. *Mayor, etc.*, v. *Gardner*, 33 N. J. Eq. 622. The acts of the defendant constituted repeated injuries to the contract rights of the plaintiff, and to put him to his legal remedy would be to compel him to bring a number of small actions. The analogy is strong to repeated trespasses upon land, where equitable relief is allowed. *Cf. Mills* v. *New Orleans Seed Co.*, 65 Miss. 391. Moreover the damage suffered by the plaintiff from the unionizing of his apprentices, while real and substantial, is extremely difficult of pecuniary estimation. This also entitles him to equitable relief. *Myers* v. *Kalamazoo Buggy Co.*, 54 Mich. 215.

EQUITY — RIGHT TO PRIVACY — USE OF PORTRAIT. — *Held*, that a demurrer to a complaint asking for an injunction against the unauthorized use of the plaintiff's portrait for advertising pu poses was rightly overruled. *Roberson* v. *Rochester Folding Box Co.*, 64 N. Y. App. Div. 30. See NOTES, p. 227.

ESTOPPEL — REPRESENTATION INDUCED BY TRICK — ABSENCE OF INTENT TO DECEIVE PLAINTIFF. — Z., owing money to the plaintiff, promised to deposit it with the defendant. Without making a deposit, Z. induced the defendant to give the plaintiff a fictitious credit, the defendant believing Z.'s assertion that the plaintiff understood the arrangement. The plaintiff, however, relied on this credit to his damage, and now sues the defendant for the amount of the credit. *Held*, that the defendant is not estopped to deny the genuineness of the credit. *Modern Woodmen* v. *Union Nat. Bank*, 108 Fed. Rep. 753 (C. C. A., Eighth Circ.).

One who makes false representations to another, intending that they be acted upon in a certain way, is estopped to set up the truth to the injury of that other after he has so acted. *Parlin* v. *Stone*, 48 Fed. Rep. 808. This rule prevails even though the representation is induced by the trick of a third person. *In re Bahia*, L. R. 3 Q. B. 584. Furthermore, an intention to cause the action produced, or even to cause the plaintiff to act at all, is not necessary; if the natural and probable result of the representation is a detrimental change of position by the plaintiff, the rule of estoppel applies. *Seton* v. *Lafone*, 19 Q. B. Div. 68; *Caswell* v. *Fuller*, 77 Me. 105. The principal case seems to come within the above rules, and the defendant therefore should be estopped. *Cornish* v. *Abington*, 4 H. & N. 549. The court was undoubtedly the less willing to find an estoppel, since the plaintiff's actual injury was slight, whereas the damages in such case, according to the settled rule, would be the amount he would have received if the representation had been true. *Casco Bank* v. *Keene*, 53 Me. 103. See EWART ON ESTOPPEL, p. 191.

EVIDENCE — PEDIGREE — DECLARATIONS OF FOSTER PARENTS. — On the question whether A was the father of B, the plaintiff offered declarations of B's foster parents, since deceased, who were not related to A or B. *Held*, that the declarations were admissible. *Alston* v. *Alston*, 86 N. W. Rep. 55. (Ia.).

Anciently, on pedigree questions, general community reputation was allowed; later, only declarations from those in the family or otherwise specially fitted to speak. HUBBACK, EVID. SUC. 653. See *Whitelocke* v. *Baker*, 13 Ves. Jun. 511, 514. The rule settled for England nearly a century ago confines the class of declarants to those related by blood or closely by marriage to one whose pedigree is in question. *Johnson* v. *Lawson*, 2 Bing. 86. If this rule, justly recommended as at once certain and intelligible, is to be relaxed at all, the declaration in the principal case is, in reason, admissible. Many American courts, while excluding declarations of mere neighbors or acquaintances, attempt to rationalize the English restriction by language approving declarations of all persons who, having lived in the family, may be supposed to know.

Chapman v. *Chapman*, 2 Conn. 347. These *dicta* are disapproved by as many others. *Flora* v. *Anderson*, 75 Fed. Rep. 217, 222. One decision, though not mentioning the point, and incorrect for another reason, involves an affirmance of the English rule. *Blackburn* v. *Crawfords*, 3 Wall. 175. That the principal case is, unfortunately, *contra* illustrates the unsatisfactory technical nature of the law of evidence for present day purposes, and the desirability of a scientific restatement.

EVIDENCE — PEDIGREE — STATUTES OF INHERITANCE OF BASTARDS. — On an issue of descent under a statute which makes a bastard heir of his father, the plaintiff offered hearsay declarations that the late owner of the property claimed was his father. *Held*, that the declarations were within the pedigree exception to the rule against hearsay. *Alston* v. *Alston*, 86 N. W. Rep. 55 (Ia.).

The pedigree exception as it has always existed in England, serves to admit declarations of family matters only when bearing on some question of legitimate relationship. *Crispin* v. *Doglioni*, 3 Sw. & Tr. 44. American courts, less strict, incline to admit declarations on any matter of family history which is relevant to any question in the case. *In re Hurlburt's Estate*, 68 Vt. 366. *Contra*, *Town of Union* v. *Town of Plainfield*, 39 Conn. 563. This practice, traceable to a misleading passage in Greenleaf, is defended to-day as within the spirit of the exception; since in respect to the trustworthiness of the evidence, there is no rational distinction between pedigree cases in the narrow sense and others. 1 GREENL. EV., 16th ed., § 114 g. An answer, aside from authority, is that this exception to the rule excluding hearsay is technical, not rational, and without any "spirit" to extend. The principal case might be supported on the ground that the statute creates a pedigree relationship. *Northrop* v. *Hale*, 76 Me. 306. But in interpreting these statutes the better rule is that they do no more than they purport; they merely give bastards lineal inheritance. *Stevenson's Heirs* v. *Sullivant*, 5 Wheat. 207, 260. In this view they no more affect relationship than would like statutes providing for inheritance by servants. A contrary decision in the principal case would therefore have been more satisfactory, and would have rested on good authority. *Flora* v. *Anderson*, 75 Fed. Rep. 217.

FIXTURES — CONDITIONAL SALE OF FURNACE — REAL ESTATE MORTGAGE — PURCHASER AT FORECLOSURE SALE. — A furnace, sold and installed under a contract providing for its return if not up to requirements, was in fact below the standard. The defendant bought the premises at a foreclosure sale under a real estate mortgage, given before the furnace was installed. *Held*, that the furnace passed with the realty to the purchaser, though it had retained its chattel character as between vendor and mortgagor. *Fuller-Warren Co.* v. *Harter*, 85 N. W. Rep. 698 (Wis.).

The court rests its decision on the Massachusetts doctrine that all chattels affixed to realty go to a prior real estate mortgagee, contract or chattel mortgage between vendor and mortgagor notwithstanding. *Clary* v. *Owen*, 15 Gray 522. According to the more equitable theory of Vermont and New Jersey, the prior real estate mortgagee is not preferred to the holder of an incumbrance on a chattel affixed to the realty subsequently to the mortgage, unless the removal of the fixture would decrease the original value of the mortgage security. *Davenport* v. *Shants*, 43 Vt. 546; *Campbell* v. *Roddy*, 44 N. J. Eq. 244. It does not appear that the defendant at the time of purchase knew of the contract concerning the furnace. If he did not, the result may be supported on the ground that the position of the defendant is stronger than that of the mortgagee. The latter advanced no money relying on the fixture as security; the former, buying the premises as they stood, would be in effect a purchaser for value without notice, and as such should be protected. This distinction seems never to have been drawn by the courts. See 10 HARV. LAW REV. 190.

INTERNATIONAL LAW — EFFECT OF CESSION ON EXISTING LAWS — IMPORT DUTIES. — Under orders issued by the President, duties were collected on goods imported by the plaintiff into Porto Rico from the United States, after the cession of that island, and before the passage of the act of Congress establishing a Porto Rican tariff. *Held*, that the goods were entitled to entry free of all duties. *Dooley* v. *United States*, 21 Sup. Ct. Rep. 762. See NOTES, p. 220.

INTERNATIONAL LAW — ENEMY CHARACTER — DOMICILE OF CORPORATION. — A mining company incorporated in Natal was granted letters of incorporation in the Transvaal, where its mine was situated, and was registered in Pretoria. After the outbreak of war the company shut down the mine, intending not to work it during

the war, but kept its property and retained its resident manager. *Held*, that the company had only a commercial domicile in the Transvaal, and that this did not invest it with enemy character. *Nigel Gold Mining Co., Lim.* v. *Hoade*, 17 T. L. R. 711.

The status of the corporation and not that of its members was in question, and in the case of corporations, as in that of individuals, enemy character is determined by domicile. *Society, etc.*, v. *Wheeler*, 2 Gall. 105, 131; *The Danckebaar Africaan*, 1 Rob. 107. Even if the plaintiff company be regarded as merely commercially domiciled, it takes enemy character on the outbreak of war, for when a foreign corporation establishes a permanent agency in a state, it is, in time of war, as to the business transacted there, in the same position as a domestic corporation. *Martine* v. *International Life Ins. Soc.*, 53 N. Y. 339. Yet the law covering such a company as the plaintiff in the principal case is stronger still. An incorporated company which takes letters of incorporation in a second state, has a separate legal domicile in that state. *Martin* v. *Baltimore & Ohio R. R. Co.*, 151 U. S. 673. The plaintiff company must therefore be regarded as having enemy character. The court professes to bring the case within the rule of *The Venus*, 8 Cranch 253. In that case the owner had abandoned his foreign domicile and business *bona fide;* but in the principal case there was nothing equivalent to such abandonment by the corporation. The decision can be explained only by the supposed humanitarian tendency of the present day in applying the rules of war.

INTERNATIONAL LAW — INSURANCE BY DOMESTIC COMPANY ON ENEMY PROPERTY. — PUBLIC POLICY. — Gold, the property of a Transvaal mining company, was insured with British underwriters against capture, amongst other risks, during transit from the mines in the Transvaal to the United Kingdom. The gold was seized by the government of the Transvaal, at a time when the Transvaal troops were in the field, and war was imminent, though before the declaration of war. Action was brought on the policy. *Held*, that the insurance of the plaintiff's property against such a seizure was not against public policy and the action is maintainable. *Driefontein, etc., Mines, Lim.* v. *Janson*, [1901] 2 K. B. 419.

Acts done in contemplation of war are, if war ensues, regarded as if done in time of war. *The Jan Frederick*, 5 Rob. 128; *The Boedes Lust*, 5 Rob. 233. The question, then, is whether it is against public policy for an insurance company to insure an alien enemy against seizure of his property by his own government. No decided case covers this. It has been held that insurance of an enemy's subject against capture of his goods by ships of the insurer's government is void. *Furtado* v. *Rogers*, 3 B. & P. 191; *Gamba* v. *Le Mesurier*, 4 East 407. The ground of the decisions was that a state could not put the same pressure on its enemy if the enemy knew it would be recouped at the end of the war by subjects of that state. This principle applies with equal if not greater force to insurance on goods seized by the government of the assured. Payment of such insurance would be relieving the enemy's subject from the pressure put upon him by his own government to carry on the war, and would in effect be paying the enemy's expenses. On principle and authority the case is wrong, though it has the practical advantage of affording relief to commerce.

INTERSTATE COMMERCE — UNREASONABLE DISCRIMINATIONS — JURISDICTION OF STATE COURT. — *Held*, that unreasonable discrimination by an interstate telegraph company is unlawful at common law and that the state court has jurisdiction. *Western Union Tel. Co.* v. *Call Publishing Co.*, 21 Sup. Ct. Rep. 561. See NOTES, p. 224.

PROPERTY — FIXTURES — ELECTRIC LIGHT FITTINGS. — *Held*, that where a hotel containing electric light fittings is sold under foreclosure, the fittings pass as a part of the realty. *Canning* v. *Owen*, 48 Atl. Rep. 1033 (R. I.).

There is considerable confusion as to what chattels annexed to the realty will pass as fixtures. The view most generally held is that, as between vendor and vendee, or mortgagor and mortgagee, whatever is annexed to the freehold by the owner with the intention that it be used and enjoyed permanently in connection therewith, passes with a conveyance of the realty. *Holland* v. *Hodgson*, L. R. 7 C. P. 328. In most American jurisdictions and in Scotland an exception has been made of gas fittings, and similarly of electric light fittings, which are considered personalty. *Vaughen* v. *Haldeman*, 33 Pa. St. 522; *Nisbet* v. *Mitchell-Innes*, 7 R. 575. In England and in Kentucky the decisions are in accord with the principal case. *Sewell* v. *Angerstein*, 18 L. T. N. S. 300; *Johnson's Exec.* v. *Wiseman's Exec.*, 4 Met. (Ky.) 357. The prevailing view seems to rest on an analogy drawn in an early case between gas fittings and lamp-brackets, which had always been considered personalty. *Montague* v. *Dent*, 10

Rich. (S. C.) 135. On principle there seems no good reason for thus making gas and electric light fittings an exception to the general rule; but the law in America is so well settled that the departure in the principal case is unfortunate.

PROPERTY — QUASI-EASEMENTS — ESTOPPEL. — One H., owning a lot with a building thereon, conveyed it by metes and bounds to X. The building was found to project six inches upon the adjoining lot. H. afterwards purchased a strip from this lot including the portion upon which the house projected. *Held*, that X is entitled to an easement in that portion for the support of the building. *Swedish-American, etc., Bank* v. *Connecticut, etc., Ins. Co.*, 86 N. W. Rep. 420 (Minn.).

Had H. been the owner of both lots at the time of the conveyance to X, the latter would have gotten the easement claimed under the doctrine of *quasi*-easements, the servitude being continuous, apparent, and necessary for the convenient use of the property granted. *Palmer* v. *Fletcher*, 1 Lev. 122; *Simmons* v. *Cloonan*, 81 N. Y. 557. The decision here seems to result from a union of this principle with the doctrine of estoppel as applied to subsequently acquired title. See *Somes* v. *Skinner*, 3 Pick. 52. Only two cases have been found raising the same question. One is in accord with the principal case. *Jarnigan* v. *Mairs*, 1 Humph. (Tenn.) 473. The other, a very recent decision, takes the opposite view. *Farley* v. *Howard*, 60 N. Y. App. Div. 193. The doctrine of the principal case seems sound and the result eminently desirable.

PROPERTY — RIPARIAN OWNERS — RIGHT TO RESTORE NATURAL LEVEL. — The defendant acquired a prescriptive right to maintain a milldam and pond back the water. The plaintiffs, upper riparian owners, had improved their land in reliance on the permanency of the pond. *Held*, that an injunction will lie restraining the defendant from removing the dam to the injury of upper owners. *Kray* v. *Muggli*, 86 N. W. Rep. 882 (Minn.).

There is little authority exactly in point and the case most nearly parallel is *contra*. *Yale* v. *Brace*, 99 Mass. 448. But in analogous cases, such as restoration of a stream previously diverted into an artificial channel, the weight of authority supports the principal case. *Delany* v. *Boston*, 2 Har. (Del.) 489. The decisions are based on the ground either of a reciprocal easement in the servient tenement, or of an equitable estoppel against the dominant. The former reason is unsatisfactory because the servient owner does nothing adverse by which an easement might be acquired; the latter because the representation relied on is not one of existing fact, but merely of intended future conduct. See *Mason* v. *Shrewsbury Ry. Co.*, L. R. 6 Q. B. 578, 587. Perhaps the correct basis for the satisfactory result in the majority of the cases is that it is not equitable to allow the dominant owner alone the right to insist on the maintenance of the changed conditions, and the law therefore substitutes them for the natural conditions and gives abutters the usual riparian rights. *Cf. Woodbury* v. *Short*, 17 Vt. 387.

PROPERTY — VENDOR AND PURCHASER — PURCHASER'S LIEN. — The plaintiff contracted to purchase a plot of land from X, paying a deposit and receiving an option in a certain event to cancel the contract. This option he afterwards exercised. *Held*, that the plaintiff had a lien on the land for his deposit, enforceable against the defendant, who had acquired X's title with notice of the contract. *Whitbread & Co., Lim.* v. *Watt*, [1901] 1 Ch. 911.

Equity purposes to treat all parties with equal justice, giving to each when possible the same remedy. For this reason the vendor and vendee of land have the same right of specific performance, and similarly equity has allowed the purchaser, as well as the vendor, a lien on the land contracted to be sold. *Wythes* v. *Lee*, 3 Drewry 396; *Bullitt* v. *Eastern Ky. Land Co.*, 99 Ky. 324. See 9 HARV. LAW REV. 486. There is a *dictum* that the purchaser's lien exists only when the contract is off by the vendor's default. *Roger* v. *Harrison*, [1893] 1 Q. B. 161, 173. This seems unsound. Just as the vendor's lien always accompanies his contractual claim for the purchase money, the purchaser's lien should be allowed whenever he has a *quasi*-contractual claim to have his deposit refunded. Apparently the weight of authority holds that the deposit is forfeited if the vendee later makes default. *Howe* v. *Smith*, 27 Ch. D. 89. When, however, the contract fails to be performed for any other reason, the purchaser has a claim for the deposit, and a lien should be allowed. In reaching that conclusion the principal case follows *Rose* v. *Watson*, 10 H. L. Cas. 672.

SALES — CONDITIONAL SALE — RESALE BY VENDOR TO HIMSELF. — The plaintiff contracted to sell to the defendant certain personalty, the title not to pass till

the price was paid. The defendant having refused to perform, the plaintiff, after proper proceedings, had the property sold at auction, and bid it in himself. He then sued to recover the difference between the contract price and the sale price. *Held*, that the plaintiff is entitled to recover. *Ackerman* v. *Rubens*, 167 N. Y. 405.

The correctness of the measure of damages adopted obviously depends upon the validity of the resale. Undoubtedly if the plaintiff did not choose to keep the property himself, he had a right to sell it and recover from the defendant the difference between the price obtained and the contract price. *Dunstan* v. *McAndrew*, 44 N. Y. 72. But it seems that the plaintiff had no right to buy at the sale, which was therefore not valid. The position of the plaintiff in reselling the property is similar to that of a pledgee or mortgagee with power of sale; in each of the three cases the creditor has a right to sell for his own protection, in case of default by the debtor. But it is well settled that a pledgee or mortgagee selling under a power of sale may not bid in the property. *Middlesex Bank* v. *Minot*, 45 Mass. 325; *Harper* v. *Ely*, 56 Ill. 179. The reason is that it is not safe to allow such purchases, on account of the chances of fraud, and therefore, though there may have been no fraud in the particular case, the sale should be held invalid. The same reason applies in the principal case. The basis on which the damages were assessed, therefore, is not established.

SALES — NON-NEGOTIABLE BILLS OF LADING — RIGHTS OF ASSIGNEE. — The seller delivered goods to a railroad company consigned to the buyer, and took in the name of the buyer a bill of lading marked "not negotiable." The bill of lading, with a draft on the buyer, was transferred to a bank, to be delivered to the buyer on acceptance of the draft. *Held*, that the delivery to the carrier passed the absolute title to the buyer, and the bank had no rights in the goods. *Bank of Litchfield* v. *Elliott*, 86 N. W. Rep. 454 (Minn.).

Ordinarily whenever a bill of lading is retained by the consignor, he has a right over the goods in the nature of a lien or mortgage, and the consignee, until he receives the bill of lading, has no right to obtain the goods or dispose of them, being liable to the consignor or the assignee of the bill of lading for so doing. *Cayuga, etc., Bank* v. *Daniels*, 47 N. Y. 631; *Freeman* v. *Kraemer*, 63 Minn. 242; *Alderman* v. *Eastern R. R. Co.*, 115 Mass. 233. When, however, goods are shipped directly to the buyer, and a non-negotiable bill of lading taken out in his name, the common practice of railroads seems to be to deliver the goods to the consignee without requiring the presentation of the bill of lading, and relying upon this custom it has been decided that the assignee of such a bill of lading had no rights against the consignee. *Forbes* v. *Boston & Lowell R. R. Co.*, 133 Mass. 154, 157. If this is in fact a general custom, the sooner its legal effect in cases like the principal one is clearly made known to the mercantile community the better, and the decision in the principal case is therefore to be welcomed.

STATUTE OF FRAUDS — ANTE-NUPTIAL AGREEMENT — MEMORANDUM. — By an oral ante-nuptial agreement a husband agreed to convey to trustees, when it should come into possession, a reversion belonging to his wife, to be held on certain trusts which, under a voluntary settlement, would not be valid as against creditors. In a post-nuptial writing the husband recited and covenanted to perform the oral agreement. He afterwards became bankrupt. *Held*, that, one agreement being oral and the other gratuitous, the trustee in bankruptcy will not be ordered to perform. *In re Holland*, [1901] 2 Ch. 145.

According to the prevailing English view and considerable American authority, a settlement after marriage conveying property in execution of an oral ante-nuptial agreement is void as against creditors. *Warden* v. *Jones*, 2 De G. & J. 76. In several jurisdictions, however, such settlements have been allowed. *Hussey* v. *Castle*, 41 Cal. 239. And in analogous cases the performance of a moral duty of this kind is usually held good against creditors. *Brown* v. *Lunt*, 37 Me. 423. Under the first mentioned rule, even when the settlement recites the former agreement, it is generally held invalid. *Winn* v. *Albert*, 5 Md. 66; *Trowell* v. *Shenton*, L. R. 8 Ch. D. 318, *semble*. The principal decision follows naturally from these cases. Yet in all such cases the recital seems to supply the necessary memorandum to validate the original contract, and an English case which, though it did not involve creditors, relied on the authority of cases which did, held a written acknowledgment after the marriage a sufficient memorandum. *Barkworth* v. *Young*, 4 Drewry 1. The principal decision seems especially unfortunate, since the memorandum was made directly after marriage and twenty-five years before bankruptcy, so that there could have been no fraud on creditors, the danger of which seems to be the ground of the decisions in the settlement

cases. No reason appears, therefore, for refusing to enforce the agreement, even if the court was unwilling to accept the rather advanced view adopted in Missouri, that marriage is sufficient part performance to make the contract binding. *Nowack* v. *Berger*, 133 Mo. 24. See 10 HARV. LAW REV. 60.

TORTS — CIVIL LIABILITY FOR DAMAGE CAUSED BY CRIMINAL ACTS. — The defendant, while beating his horse with a pointed stick, slipped and thereby accidentally struck the plaintiff. *Held*, that the jury should have been instructed that if the defendant was breaking a statute forbidding cruelty to animals, he was liable for damage directly resulting to the plaintiff, whether or not it ought reasonably to have been foreseen. *Osborne* v. *Van Dyke*, 85 N. W. Rep. 784 (Ia.). See NOTES, p. 225.

TORTS — LIABILITY FOR INCREASING BURDEN OF CONTRACT — SUBROGATION. — The defendant negligently injured a bridge, which the plaintiff was under bonds to the county to keep in repair. The plaintiff repaired the bridge, and sued the defendant. *Held*, that the injury was done to the plaintiff and that he was entitled to recover the cost of repairing the bridge. *Cue* v. *Breland*, 29 So. Rep. 850 (Miss.).

The decisions exactly in point are uniformly opposed to the position of the court. *Rockingham, etc., Ins. Co.* v. *Bosher*, 39 Me. 253; but *cf. McNary* v. *Chamberlain*, 34 Conn. 384. It is obvious that no property interest is acquired in a chattel by undertaking to indemnify the owner in case of its loss, and to place tort-feasors under a liability to all who may be damaged by reason of contractual relations with the party whose person or property is directly injured, would work a dangerous extension of legal responsibility by opening a wide and uncertain field of litigation. *Connecticut, etc., Ins. Co.* v. *New York, etc., R. R. Co.*, 25 Conn. 265. The interests of the plaintiff, like those of an insurer, are amply protected by his privilege of subrogation. He has an enforcible right to bring an action in the name of the owner of the property (or under code provisions, in his own name) and reimburse himself out of the damages for the loss he has sustained. *Hart* v. *Western R. R. Corporation*, 54 Mass. 99. The court in the principal case, while doing substantial justice, disregards principles which in analogous cases might entirely change the result. *Cf. Midland Ins. Co.* v. *Smith*, 6 Q. B. Div. 561.

TORTS — LIBEL — PUBLICATION BY DICTATION TO A STENOGRAPHER. — The defendant dictated a libellous letter to his stenographer, who subsequently wrote it with a typewriter and transmitted it by the defendant's direction to the person libelled. *Held*, that there was a publication of the libel. *Gambrill* v. *Schooley*, 48 Atl. Rep. 730 (Md.). See NOTES, p. 230.

TRUSTS — PURCHASER FOR VALUE WITHOUT NOTICE. — POWER OF ATTORNEY. — A trustee gave the plaintiff as security equitable mortgages on certain leaseholds which, unknown to the plaintiff, he held in trust, and in addition gave a power of attorney to three of the plaintiff's clerks to transfer the titles to the leaseholds as the plaintiff should direct. On hearing of the trust, the plaintiff had the titles conveyed to itself. *Held*, that the plaintiff thereby acquired the titles, but held them subject to an equity in favor of the trust estate. *London and County Banking Co.* v. *Nixon*, [1901] 2 Ch. 231. See NOTES, p. 226.

WILLS — CHARITABLE TRUSTS — DEVISE TO CORPORATION. — A will directed that the proceeds of the residue be "held in trust" by an incorporated foreign missionary society, to educate Bible readers and to erect a building for foreign missionary purposes. *Held*, that the money comes to the society, not as a trust, but as a "gift with conditions annexed to its expenditure." *Sherman* v. *Mitchell*, 48 Atl. Rep. 737 (Md.).

A residue was bequeathed to a camp-meeting association incorporated as auxiliary to the Methodist Church, to be invested, and the income to be applied for educational purposes, with discretion in the association as to the beneficiary. *Held*, that the association takes the residue, not as a trust, but as an absolute gift. *Matter of Griffin*, 167 N. Y. 71.

The legacies in both these cases being for corporate purposes, expressions indicating a trust are held surplusage. Whether or not a devise for general corporate purposes creates a trust is a speculative question; for in either case the state will prevent misappropriation as *ultra vires*. Many authorities find a trust. *The Incorporated Society* v. *Richards*, 1 Dr. & War. 258, 293; *De Camp* v. *Dobbins*, 29 N. J. Eq. 36. If

a will specifies certain corporate purposes, diversion of the fund to others is not *ultra vires*, and authorities enforcing these restrictions on the ground of trust are almost countless. *President, etc., of Harvard College* v. *Society for P. T. E.*, 69 Mass. 280. It is noticeable that if a trust was intended in *Sherman* v. *Mitchell*, *supra*, it was, by the Maryland rule, void for uncertainty. *Needles* v. *Martin*, 33 Md. 609. The New York cases which *Matter of Griffin*, *supra*, follows were in like circumstance. *Wetmore* v. *Parker*, 52 N. Y. 450; *Bird* v. *Merklee*, 144 N. Y. 544. So too the only other case found in accord with the principal cases. *Executors of McDonough* v. *Murdoch*, 15 How. 367, 380. *Sherman* v. *Mitchell*, *supra*, annexes a condition to the bequest, presumably in favor of the estate. This, even if legally conceivable, only approximates the testator's intention, for that was, as the court agrees, to exclude his next of kin. The construction as a whole is merely a convenient device to save as a gift a charitable bequest which would fail as a trust. A statute similar to that now in force in New York is a more scientific remedy.

REVIEWS.

THE LIABILITY OF MUNICIPAL CORPORATIONS FOR TORTS. By Water man L. Williams. Boston: Little, Brown & Co. 1901. pp. xxxix, 345. 8vo.

The subject of municipal liability for tort, with its somewhat peculiar and special doctrines and its frequent conflicts of authority, presents an especially fruitful field for a text writer, and one in which there has been but little fundamental investigation. Its basic principles involve the underlying theories of government and society. Its application, however, is of great practical importance, especially in view of the growing socialistic tendency of our municipalities to branch out into new classes of public enterprise. In the present volume, Mr. Williams has given us a most excellent handbook and practical treatise upon this latter and every-day side of the subject. He has clearly stated the main principles and graphically applied them to the different classes of cases that arise, so that many of the conflicts are explained, or at least shown to be only the results of difficulties in applying these principles to complicated questions of fact. The whole subject is covered with much thoroughness and detail, with a full citation of cases upon all the different topics. Statutory liability for tort, especially in relation to public highways, is also extensively discussed. The book will thus prove valuable to any practitioner who deals with this branch of the law.

But to the legal student this work is somewhat disappointing. We cannot believe that the topic has reached its final crystallization. Hence a thorough investigation and development of the fundamental principles in the light of new analogies and with new applications would not only prove of great scientific interest, but would be most important in establishing rules of liability upon a clearer and more satisfactory basis. By confining himself less closely to the statement of the law and by giving more attention to this more important phase of the subject, the author would have rendered a much more important service to the profession.

W. H. H.